

**Submission by Freight Rail Corporation
concerning the Australian Rail Track
Corporation Limited Amended Access
Undertaking,**

October 3, 2001

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1 Background

The Australian Rail Track Corporation Ltd (**ARTC**) has lodged with the Australian Competition and Consumer Commission (**ACCC**) an amended version of an access undertaking for a non-declared service (**Amended Access Undertaking**).

The ACCC has sought submissions on the Amended Access Undertaking by October 3, 2001.

2 Summary

Whilst FreightCorp Rail Corporation (**FreightCorp**) welcomes the amendments in the Amended Access Undertaking, FreightCorp considers that there remain many issues raised in the joint Toll Rail and FreightCorp submission dated June 13, 2001 (**Toll/FreightCorp Submission**) that need to be addressed.

Very few of the issues raised in the Toll/FRC Submission have been dealt with in the Amended Access Undertaking; indeed only three of the 19 Recommendations suggested in the Toll/FreightCorp Submission have been reflected to any extent in the Amended Access Undertaking. For ease of reference, Section 3 below sets out the Recommendations made in the Toll/FreightCorp Submission.

Accordingly, FreightCorp's recommendations (and the commentary on them) made in relation to the previous draft of the ARTC Access Undertaking, and the comments made in the mark-up of the Indicative Access Agreement, remain.

Consistent with general acknowledgment, the meeting at the offices of the ACCC on August 16, 2001 did not provide a forum to debate, in detail, the issues raised in submissions.

FreightCorp considers that a round table session with ARTC, and other rail industry participants, with the ACCC attending in the role of observer, to debate the detail of the issues. FreightCorp suggests that such a session be a sponsored by the ACCC. FreightCorp considers that such a session would promote a greater understanding of the issues and consequently, at worst, achieve a greatly improved understanding of ARTC's position and, at best, achieve a greatly improved access undertaking.

In addition, FreightCorp considers that such an approach would demonstrate a level of responsiveness from a monopoly infrastructure owner/operator yet to be seen in Australia. Absent such an approach, ARTC will continue to demonstrate a lack of regard for issues of concern to access seekers. This lack of regard is in keeping with its position as a monopoly owner.

3 Comments on the Amended Access Undertaking

Generally, FreightCorp welcomes the amendments in the Amended Access Undertaking. Specifically, FreightCorp comments as follows:

3.1 Clause 2.1(d)

FreightCorp welcomes ARTC's undertaking to submit an access undertaking to the ACCC if ARTC becomes a provider in respect of other rail infrastructure.

3.2 Clause 2.6 (b)

FreightCorp welcomes ARTC's undertaking to make further information available on its website, but remains concerned that sufficient information is made available to enable applicants to conduct their own capacity analysis. This concern can be addressed in a number of ways. The preference of FreightCorp is that it is a general obligation is included in the ARTC Access Undertaking to this effect.

3.3 Clause 3

FreightCorp welcomes the introduction of an obligation to negotiate in good faith, but notes that ARTC is not undertaking to use reasonable endeavours to comply with a request for access as suggested in Toll/FreightCorp Submission.

3.4 Clause 3.11.3

FreightCorp notes that ARTC has removed the requirement for compulsory mediation.

3.5 Clauses 3.11.4 and 3.11.5

FreightCorp notes that ARTC has provided drafting to prescribe how the ACCC is to act as arbitrator. FreightCorp notes also that the role of the ACCC as arbitrator is uncertain.

FreightCorp considers that it is appropriate for it to comment on clauses 3.11(4) and 3.11(5) of the Amended Access Undertaking (and clause 17 of the Indicative Access Agreement), when the role of the ACCC is clarified.

3.6 Part 8 of the Amended Access Undertaking

FreightCorp welcomes the development of performance indicators. FreightCorp notes that its observations are preliminary given the form of the indicators and in its view it would benefit greatly from consideration of the indicators at an industry level. That said, FreightCorp observes that:

- The basis upon which performance against the performance indicators is reported on the website of ARTC needs to be understood, in particular how any confidentiality issues are to be addressed;
- The impact of track quality on performance indicators needs to be understood;
- Infrastructure, such as signalling equipment and communication equipment, are not subject to the performance indicators;
- The performance indicators do not relate to the key issue of safety, an issue that requires measurement and management attention;
- The operator is responsible for timely entry to the Network, whereas the key issue for operators is to see coordination between access providers to ensure that each of them provides that which they have contracted to provide to operators;
- The definition of a healthy train needs to be understood more clearly because as it stands delay caused other than by an operator will make that operator's train unhealthy; and
- FreightCorp has a strong preference for monthly reporting.

3.7 Amendments not commented upon

If FreightCorp has not commented on amendments, it accepts them.

4 FreightCorp Recommendations

As noted above, for ease of reference FreightCorp sets out below Recommendations (other than Recommendations 7 and 18 which have been accepted) made in the Toll/FreightCorp Submission. As noted in that Submission, the Recommendations should be read with the full text of that Submission.

Recommendation 1: Because the Preamble is relevant in deciding disputes, it should be viewed critically to ensure that it does not lead to an imbalance as between the legitimate business interests of ARTC as the provider, the public interest and the interests of persons who might want access to the service.¹

Recommendation 2: The undertaking should make it clear what constitutes an extension and what constitutes Additional Capacity.

Recommendation 3: To achieve a level playing field, the access undertaking should allow operators with existing access agreements the option to bring their existing access agreements into conformity with Schedule C or the Indicative Access Agreement to ensure that they are not disadvantaged. In allowing operators with existing access agreements to do this, the access undertaking will safeguard the public interest of having competition in markets.

Recommendation 4: It is suggested that the access undertaking should state what is meant by consultation, further it is suggested that the access undertaking state that Operators and interested parties may make submissions to the ACCC in respect of the proposed variation.

Recommendation 5: It is suggested that the access undertaking should state that no variation to the access undertaking may vary, or require any Operator to agree to vary, an access agreement. (Note that clause 2.5 does not do this clearly.)

Recommendation 6: FreightCorp and Toll consider that it is appropriate for the access undertaking to provide that it will be reviewed 12 months after it is accepted by the ACCC.

Recommendation 8: FreightCorp and Toll suggest that the findings of the QCA should be considered closely, in particular, that "... QR should disclose sufficient capacity information to allow access seekers to conduct their own capacity analysis".² This approach will provide access seekers with "relevant information necessary for meaningful negotiations".

Recommendation 9: FreightCorp and Toll question whether ARTC should have the right to require an Applicant to demonstrate that it is Solvent unless it has a reasonable apprehension that the Applicant may not be Solvent.

¹ See the matter stated in section 44ZZA(3) of the *Trade Practices Act 1974* (Cth) (TPA)

² QCA Draft Decision, Volume 2, Chapter 4.6.2, p.184

Recommendation 10: FreightCorp and Toll commend to ARTC and the ACCC the findings of the QCA.

Recommendation 11: FreightCorp and Toll consider that it is appropriate for the access undertaking to state the consequences of the ARTC's refusal to negotiate.

Recommendation 12: FreightCorp and Toll consider that it is appropriate for the access undertaking to state the consequences of a determination against ARTC in respect of the subject matter of clauses 3.3 (f), 3.3 (g), 3.7 (b) or 3.7 (e). This is necessary to provide "effective provisions for dispute resolution".

Recommendation 13: FreightCorp and Toll consider that it is appropriate for the access undertaking to provide a process whereby when any matter the subject of clauses 3.3 (f), 3.7 (b) and 3.7 (e) is in dispute can be resolved on an expedited basis.

Recommendation 14: FreightCorp and Toll consider that it is appropriate for the access undertaking to contain an obligation on ARTC to be bound by an Indicative Access Proposal for a period of time and to inform Applicants immediately if it no longer wants (after that time), or is no longer able (after an auction), to provide access in accordance with an Indicative Access Proposal.

Recommendation 15: FreightCorp and Toll consider that clause 3.9 (e) of the access undertaking should be deleted and replaced by a provision that acknowledges that if agreement is not reached within three months, either party may refer the matter to dispute resolution.

Recommendation 16: Having regard to the interests of persons who might want access³, FreightCorp and Toll consider that if an auction process is to be considered the basis upon which it is to be conducted is critical, and in this regard that the QCA Draft Decision should be considered.⁴ Further, FreightCorp and Toll consider that the criteria for assessment of each bid must be prescribed. This prescription should be included in the undertaking and must go beyond the "highest present value" to state how that value is determined.

Recommendation 17: FreightCorp and Toll consider that the access undertaking should be amended to provide a clear base case for Applicants representing reasonable "terms and conditions", and as such "what terms and conditions are open for negotiation".

FreightCorp and Toll consider that the access undertaking should be amended to provide a clear statement of provisions that ARTC must not seek to include in any Access Agreement.

(For further detail see the comments on Schedule C below.)

Recommendation 19: FreightCorp and Toll suggest that to achieve effective provisions for dispute resolution it is critical that the dispute resolution process allows for:

- ARTC and the Applicant to be able to assess whether it is appropriate to proceed to arbitration, and, if so, on which issues;

³ See the matter stated in section 44ZZA (3)(c) of the TPA

⁴ QCA Draft Decision, Volume 2, pp.82-286

- Safeguards to ensure that ARTC and Applicants do not proceed to the dispute resolution process precipitously (the access undertaking contains these⁵), but once they do proceed to dispute resolution that the process allows resolution as quickly as possible; and
- A suitably qualified entity or person to be the arbitrator or that such an entity or person has the ability to appoint the arbitrator.

⁵ Clause 3.9 of the access undertaking